No. A-760

75-1539

In the Supreme Court of the United States

October Term 1975

BOARD OF OPTOMETRY, STATE OF CALIFORNIA,

Appellant,

v.

CALIFORNIA CITIZENS ACTION GROUP, et al.,

Appellees.

On Appeal from the United States District Court for the Central District of California

---

JURISDICTIONAL STATEMENT

EVELLE J. YOUNGER,
Attorney General, State of California
JAY M. BLOOM,
Deputy Attorney General
ALVIN J. KOROBKIN,
Deputy Attorney General
110 West "A" Street, Suite 600
San Diego, California 92101
Telephone: (714) 236-7509

Attorneys for Appellant

SUBJECT INDEX

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

No. A-760

BOARD OF OPTOMETRY, STATE OF CALIFORNIA,

Appellant,

v.

CALIFORNIA CITIZENS ACTION GROUP, et al.,

Appellees.

On Appeal From the United States District Court for the Central District of California

---

JURISDICTIONAL STATEMENT

Appellant appeals from the Order Granting Preliminary Injunction entered by a three-judge District Court, Central District of California, on February 5, 1976. Said preliminary injunction enjoined the State of California from enforcing California Business and Professions Code sections 651.3, 2556 and 3129. Appellant submits this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The 2-1 opinion of the three-judge District Court, Central District of California, is not yet reported and is set forth in Appendix A. The Order Granting Preliminary Injunction entered on February 5, 1976, is set forth in Appendix B.

JURISDICTION

This suit seeks to enjoin the State of California from enforcing state statutes alleged to be unconstitutional under the First Amendment. The Order Granting an Interlocutory Injunction was entered by the three-judge District Court on February 5, 1976. Appellant filed a notice of appeal with the clerk of the District Court on February 27, 1976. Jurisdiction to review the order rests with the United States Supreme Court pursuant to 28 U.S.C. section 1253.

STATUTES INVOLVED

The statutes and regulation challenged by appellees prohibit advertising the price of commodities furnished or services performed by licensed physicians and surgeons (ophthalmologists), optometrists and registered dispensing opticians. The challenged portions of the California Business and Professions Code provide:

> "§ 651.3. No person, whether or not licensed under this division, shall advertise or cause or permit to be advertised, any representations in any form which in any manner, whether directly or indirectly, refer

> to the cost, price, charge, or fee to be paid for any commodity or commodities furnished or any service or services performed by any person licensed as a physician and surgeon, optometrist . . . registered dispensing optician, when those commodities or services are furnished in connection with the professional practice or business for which he is licensed . . . ."

> "§ 2556. It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof . . . ."

> "§ 3129. It is unlawful to advertise at a stipulated price . . . any of the following:
>
> " . . . the furnishing of a lens, lenses, glasses, or the frames or fittings thereof . . . ."

Title 16 of the California Administrative Code of the State of California provides in relevant part:

> "Section 1515(b). No advertising of any optometrical service may state any stipulated amount of money or no money as a 'down payment' or any 'no charge for credit' or any stipulated amount of money as a periodical payment or at the termination of any period of time."

QUESTION PRESENTED

Did the three-judge District Court abuse its discretion when it issued a preliminary injunction prohibiting the State of California from enforcing statutes which prohibit commercial advertising of the price of prescription eyeglasses and contact lenses.

STATEMENT OF THE CASE

Appellant is the California State Board of Optometry (hereinafter referred to as the Board). It is required by law to protect the health and welfare of California citizens by enforcing statutes which regulate the practice of optometry in California. Appellees are the California Citizens Action Group, a California non-profit organization, and five California residents who use prescription eyeglasses.

Appellees brought this action in the United States District Court, Central District of California, Case No. CV 74-2079-FW, to enjoin appellant, the California Board of Medical Examiners, and the California Department of Consumer Affairs from enforcing several statutes and an administrative regulation governing the advertising of services and materials related to the furnishing of eye care. Appellees contended the statutes unconstitutionally infringed upon their claimed First Amendment rights to seek information. The statutes at issue are sections 651.3, 2556 and 3129 of the California Business and Professions Code and Title 16, section 1515(b) of the California Administrative Code. Appellees asserted jurisdiction pursuant to 28 U.S.C. sections 1331 and 1343(3).

Before the hearing on appellees' motion for a preliminary injunction, the District Court consolidated this action with Central District of California Case No. CV 74-2321 (AAH) FW (a similar action brought by Terminal-Hudson Electronics, Inc. of California, dba Opti-Cal, a registered dispensing optician), and ordered the convening of a District Court of three judges pursuant to 28 U.S.C. section 2281. On January 6, 1976, approximately nine months after the hearing on the motion for a preliminary injunction, the District Court issued a 2-1 decision stating that it would preliminarily enjoin the named defendants from enforcing the challenged statutes and regulation. The court also dismissed Case No. CV 74-2321 (AAH) FW on the grounds that a state suit involving the same parties and issues is currently pending in the state court. That dismissal is not before this Court. The Order for Preliminary Injunction was entered by the District Court on February 5, 1976. On February 27, 1976, appellant filed with the Clerk of the District Court a notice of appeal from the ordering granting a preliminary injunction.

On March 22, 1976, this Honorable United States Supreme Court granted appellant's application for a stay of the preliminary injunction.

THE QUESTIONS ARE SUBSTANTIAL

THE THREE-JUDGE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ISSUED A PRELIMINARY INJUNCTION PROHIBITING THE STATE OF CALIFORNIA FROM ENFORCING STATUTES WHICH PROHIBIT COMMERCIAL ADVERTISING OF THE PRICE OF PRESCRIPTION EYEGLASSES AND CONTACT LENSES

A. The United States Supreme Court Has Previously Upheld the Constitutionality of Statutes Prohibiting Price Advertising of Eyeglasses

In Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1954), the United States Supreme Court held that a state may constitutionally prohibit advertising of eyeglasses. The lower court had declared invalid that portion of an Oklahoma statute making it unlawful "to solicit the sale of frames, mountings or other optical appliances" on the grounds that the advertising of eyeglass frames "only casually related to the visual care of the public." The Supreme Court reversed and upheld the constitutionality of the Oklahoma statute, holding as follows:

> "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to

> regulate one effectively it would have to regulate the other. Or it might conclude that both the sellers of frames and the sellers of lenses were in a business where advertising should be limited or even abolished in the public interest. Semler v. Oregon State Dental Examiners (US) supra. The advertiser of frames may be using his ads to bring in customers who will buy lenses. If the advertisement of lenses is to be abolished or controlled, the advertising of frames must come under the same restraints; or so the legislature might think. We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." (Emphasis added.) 348 U.S. at 490.

In Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963), the United States Supreme Court again upheld the constitutionality of statutes which prohibit "advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings." Citing the Williamson case, the Court held as follows at page 428:

> "Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established."

The three-judge District Court ignored the decisions of the Supreme Court in Williamson and Head, supra, on the theory that the challenges in those cases "were based upon claims of a lack of due process and unequal treatment under the Fourteenth Amendment" and that First Amendment issues "were not invoked." Appellant contends that the lower court unduly restricted the meaning and effect of these Supreme Court cases. This is particularly true in the Williamson case where the United States Supreme Court did not limit itself to any one section of the Constitution when it said that there are "no constitutional" reasons why a state may not prohibit all who deal with the human eye from using merchandising methods for obtaining customers. Williamson v. Lee Optical of Oklahoma, supra, 348 U.S. 483, 490.

B. The Three-Judge District Court Failed to Balance the Interests of the State in Protecting the Health of Its Citizens Against the First Amendment Interests at Stake, as Required by Bigelow v. Virginia, 421 U.S. 809 (1975)

In issuing its preliminary injunction, the lower court relied heavily upon Bigelow v. Virginia, 421 U.S. 809 (1975). Appellant contends that the lower court completely misread Bigelow and that the lower court's decision is actually contrary to the ruling of this Honorable Court in Bigelow.

In Bigelow, the managing editor of a newspaper was convicted of violating a Virginia statute prohibiting the sale or circulation of any publication encouraging or prompting the procuring of an abortion.

The editor had published a New York City organization's advertisement of low-cost abortion placements. The Virginia Supreme Court had rejected the editor's First Amendment defense on the theory that "commercial advertising" was not entitled to the free speech and press guarantees of the First Amendment. The United States Supreme Court reversed, holding that the Virginia court had erred in assuming that commercial advertising was entitled to no First Amendment protection. Bigelow v. Virginia, supra, 421 U.S. at 825.

The three-judge court in the instant case erroneously concluded that Bigelow automatically resolved all "commercial speech" and First Amendment issues in favor of appellees herein, and that a preliminary injunction should therefore issue against enforcement of the challenged California statutes. The lower court then proceeded to make the same mistake the Virginia Supreme Court made in Bigelow -- it failed to weigh the First Amendment interest at stake against the public interest served by the regulations. This Honorable Court stated in Bigelow that a court "may not escape the task" of balancing the interests at stake, and that said task "should have been undertaken by the Virginia courts before they reached their decision." Bigelow v. Virginia, supra, at 825-26.

In rejecting appellant's contention that price advertising of prescription eyeglasses constitutes unprotected "commercial speech," the lower court herein erroneously concluded that nothing further need be done. It failed, utterly and completely, to perform the balancing-the-interests test mandated by this Court in Bigelow. At the brief (approximately one-hour) hearing in this case, consisting of oral

argument, no testimony was permitted or taken. Several months later Bigelow was decided by this Court. Several months after Bigelow the lower court simply issued a preliminary injunction without engaging in any weighing or balancing tests required by this Court in Bigelow. The lower court erroneously concluded that it could "escape the task" of balancing the interests at stake, at least temporarily, by issuing a preliminary injunction against state enforcement of California statutes which have prohibited price advertising of prescription eyeglasses for over thirty years. Appellant submits that such action by the three-judge District Court constitutes a clear abuse of discretion. The order granting a preliminary injunction should be reversed.

C. Bigelow v. Virginia, Supra, Reaffirms that a State May Constitutionally Regulate Commercial Advertising of Prescription Eyeglasses Without Being in Violation of the First Amendment

The three-judge District Court further abused its discretion in issuing the preliminary injunction because it ignored that portion of Bigelow v. Virginia, supra, which expressly reaffirmed this Court's previous decisions upholding prohibitions against price advertising of eyeglasses. The lower court's opinion attempts to distinguish Williamson v. Lee Optical of Oklahoma and Head v. New Mexico Board of Examiners in Optometry, supra, on the grounds that those cases involved Fourteenth Amendment claims rather than First Amendment claims. The lower court then attempts to rely upon certain portions of Bigelow v. Virginia, supra, a First Amendment case,

choosing to ignore the express statement in Bigelow that the First Amendment does not invalidate this Court's previous decisions in Williamson and Head which uphold the constitutionality of eyeglass price advertising prohibitions. This Court stated in footnote 10 on page 825 of its opinion in Bigelow:

> "Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See North Dakota Pharmacy Bd. v. Synder's Stores, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); Head v. New Mexico Board, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); Barsky v. Board of Regents, 374 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 (1954); Semler v. Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935)."

Appellant contends that the lower court committed a clear abuse of discretion when it issued the preliminary injunction despite this Court's express reaffirmation of Williamson and Head in the Bigelow opinion.

D. A Preliminary Injunction Should Not Have Been Issued Against the State of California While Cases Presenting Similar Issues Have Been Argued and Are Pending in This Court

On November 11, 1975, this Honorable Supreme Court heard arguments in Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc., Case No. 74-895, probable jurisdiction noted ___ U.S. ___, 95 S.Ct. 1389, 43 L.Ed.2d 650 (1975). On September 2, 1975, an appeal was filed in California State Board of Pharmacy v. Terry, 395 F.Supp. 94 (N.D. Calif. 1975), Case No. 75-336, 44 U.S.L.W. 3155. Both of these actions present the issue whether the First Amendment grants consumers a "right to know," thereby invalidating statutes prohibiting the commercial advertising of the price of prescription drugs. Thus, the issue presented is similar to the issue in the instant case. The District Court relied upon the Virginia case, supra, in issuing its preliminary injunction, even though this Court heard oral argument prior to the District Court decision and has not yet issued its decision therein.

If this Court reverses the Virginia case, the order granting a preliminary injunction in the instant case should obviously be reversed.

Even if this Court affirms the Virginia case, supra, in its pending decision, the instant case involves the providing of medical and health related services in conjunction with the dispensing of prescription eyeglasses and contact lenses -- services which may not necessarily accompany the furnishing of prepackaged prescription drugs. Price advertising of eyeglasses and contact lenses will result in deterioration of the quality of the medical and health related services provided by registered dispensing opticians, physicians and surgeons, and optometrists. Such a deterioration in the quality of services would cause serious physical damage to the public, as well as causing medical symptoms and defective vision resulting in serious physical injury to the patient or others. Significant and permanent damage to the eye may be caused by improper performance of these medical and health related services.

E. The Preliminary Injunction Upsets, Rather than Maintains, the Status Quo Pending Trial on the Merits

In opposing the issuance of a preliminary injunction below, appellant argued that such an injunction would upset the status quo, rather than maintain it, contrary to the general rule governing issuance of a preliminary injunction. King v. Saddleback Junior College District, 425 F.2d 426, 427 (9th Cir. 1970); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 475-76 (9th Cir. 1969); Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808-09 (9th Cir. 1963), cert. denied, 375 U.S. 821 (1963). Appellant's argument was premised upon the continuous existence of the challenged statutes since 1939, 1961 and 1973. Issuance of the preliminary injunction would upset the status quo, i.e., the longstanding existence of laws prohibiting price advertising of prescription eyeglasses, pending trial on the merits, rather than maintain the status quo pending trial.

The lower court concluded, however, that the status quo was not the existing statutory scheme but was in reality the "present day privileges and immunities under the First Amendment"; and that enforcement of the state statutes involved herein threatened the status quo of said "present day privileges and immunities." We are never told which specific "present day privileges and immunities" qualify to replace the longstanding California statutes as the "status quo," except for an oblique reference to the dilution of the commercial speech doctrine first enunciated in Valentine v. Chrestensen, 316 U.S. 52 (1942).

Appellant contends that there exists no judicial authority for such a strained definition of what constitutes the "status quo," for purposes of issuing or denying a preliminary injunction. The court clearly abused its discretion in connection with its resolution of the "status quo" issue.

F. The California Public Will Suffer Irreparable Harm if the Preliminary Injunction Is Affirmed and Allowed to Go Into Effect

The public will suffer irreparable injury if the preliminary injunction is affirmed and price advertising of eyeglasses and contact lenses is permitted pending trial on the merits. As physicians, optometrists and opticians cut corners in order to meet advertised "loss leaders" and "specials," valuable and necessary services will be abbreviated or eliminated in the dispensing of prescription eyeglasses and contact lenses. The result of this deterioration of quality will be serious harm to the eyes and to the health of the public, which can never be remedied by success at the trial on the merits. Denial of a permanent injunction at the conclusion of the trial on the merits will come too late for the victim of this harm if the order granting preliminary injunction is affirmed and allowed to go into effect.

Appellant has enforced the statutes at issue in this action for over thirty years. By reversing the preliminary injunction order, this Court will preserve the status quo pending trial on the merits. If the preliminary injunction is affirmed and allowed to go into effect, these statutes which have been relied upon as

a means of insuring quality control for ophthalmic goods and services, and for professional conduct, will be unenforceable by the State of California. The resulting chaos will damage the health and welfare of the citizens of California in an irreparable manner and will not be in the public interest.

The statutes at issue are an effective method of insuring professional conduct and the supply of quality ophthalmic materials. Without the mania of increased price competition through commercial price advertising, professionals have little incentive to resort to unscrupulous promotional methods to provide eyeglasses, contact lenses and accompanying dispensing services at a low price but even lower quality.

G. Reversal of the Order Granting a Preliminary Injunction Will Not Harm Appellees, Will Prevent a Multiplicity of Litigation and Will Serve the Public Interest

Under section 3131 of the California Business and Professions Code, private plaintiffs are empowered to bring actions to enforce section 3129 of said Code. Since the only defendants in this action are state agencies, private plaintiffs are still free to bring actions to enforce section 3129. Similarly, district attorneys are authorized to seek injunctions to enforce sections 3129, 2556 and 651.3 of the Business and Professions Code. See sections 3131, 2559 and 656 of the Business and Professions Code. Thus, appellees' goal of acquiring the information the dissemination of which is prohibited by the statutes

at issue can be prevented by private plaintiffs, and by district attorneys, even if this Court does not reverse the lower court. Under these circumstances, reversal of the District Court's order will not effectively impair the rights of appellees yet it will greatly aid the protection of the health and welfare of the people of California.

Furthermore, reversal of the lower court's order will prevent a multiplicity of litigation. Since section 3131 of the Business and Professions Code authorizes private plaintiffs to enforce Business and Professions Code section 3129, the California courts will be thrown into confusion as to whether they should follow the apparent decision of the District Court that the statutes are unconstitutional, or the state cases that uphold the constitutionality of the same statutes. Price advertising could therefore be legal in one area of the state and illegal in other areas. Expedited appeals in the state courts would then be necessary to resolve the conflict. This would impose a tremendous and unnecessary burden on the California courts -- a burden which will be avoided if this Court reverses the order granting a preliminary injunction.

For over thirty years the State of California has relied upon the statutes prohibiting price advertising of prescription eyeglasses and contact lenses as its tool to protect the health and welfare of Californians with respect to the provision of ophthalmic services and goods. The District Court has taken away this tool and left this health care area essentially without regulation. Only the stay order issued by this Court preserved the state's ability to so protect the health of its citizens. The threat of serious harm to the public clearly outweighs the minimal harm to the appellees,

who can be effectively prevented by private plaintiffs from obtaining much of the information they seek.

CONCLUSION

For all of the above reasons, appellant most respectfully invokes the jurisdiction of this Honorable Court.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General
State of California

JAY M. BLOOM,
Deputy Attorney General

ALVIN J. KOROBKIN,
Deputy Attorney General

Attorneys for Appellant

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TERMINAL-HUDSON ELECTRONICS, INC. OF CALIFORNIA, dba OPTI-CAL, Plaintiff, v. DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	)	DECISION No. CV 74-2321 (AAH) FW
CALIFORNIA CITIZEN ACTION GROUP, et al., Plaintiffs, v. DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	)	CONSOLIDATED No. CV 74-2079 ALS

Before: ELY, Circuit Judge, EAST, Senior District Judge, and WHELAN, District Judge*

EAST, Senior District Judge:

The above cases were consolidated as a matter of judicial expediency for hearing upon the several motions of the respective parties as hereinafter delineated.

---

*The above Case No. 74-2321 was upon the filing thereof assigned to the calendar of the Honorable A. Andrew Hauk, District Judge for this District, and thereafter transferred pursuant to the local rules of the district to the calendar of the Honorable Francis C. Whelan, District Judge above. (Cont.)

CASE NO. CV 74-2079 ALS

Plaintiffs' Cause:

IT APPEARS from the verified complaint:

The plaintiff California Citizen Action Group, (hereinafter referred to as CCAG) is a non-profit, non-partisian, volunteer organization incorporated in California, with a membership of approximately 800, many of whom are wearers of prescription eyeglasses;

The plaintiffs Dick Davis, Pedro Gonzales, Nathan Seiderman and Ernest A. Jacobi (hereinafter referred to as the Named Plaintiffs) are residents of the State of California and suffer certain optical infirmities which require that they wear prescriptive eyeglasses; and

The defendants are the Department of Consumer

Upon the written certificate of Judge Whelan, the Honorable Richard H. Chambers, Chief Judge for the Ninth Circuit, by written designation dated September 3, 1974, designated the Honorable Walter Ely, Circuit Judge for the Ninth Circuit, Senior District Judge William G. East for the District of Oregon, and the Honorable Francis C. Whelan, District Judge aforesaid, as constituting the above statutory three-judge District Court to hear Case No. 74-2321.

The above Case No. 74-2079 was upon the filing thereof assigned to the calendar of the Honorable Albert Lee Stephens,

Affairs, State Board of Optometry, and State Board of Medical Examiners, each statutory agencies of the State of California, and the respective individuals constituting the membership of the agencies, (hereinafter collectively and severally referred to as Defendants).

Jr., Chief Judge of this District. Upon the written certificate of Chief Judge Stephens dated November 5, 1974, and with the consent of all judges concerned, Chief Judge Chambers, by written designation dated on or about December 13, 1974, designated the above-named membership as constituting the statutory three-judge District Court to also hear the related Case No. 74-2321.

Chief Judge Chambers' designation last mentioned above and dated on or about December 13, 1974, provided, *inter alia*:

> "Judge Whelan is designated as a member of the court for economy in judicial effort.
>
> "Any party objecting to the membership of the court shall file an objection in the district court within 14 days from the date of the filing of this order in the district court."

No objection to that designation was at any time filed. *Cf. Hicks v. Miranda*, 43 U.S.L.W. 4857 (U.S. June 24, 1975) at 4858 n. 5, and at 4863 (Burger, C.J., concurring).

The Business and Professions Code of the State of California provides in relevant part:

> Section 651.3: "No person, whether or not licensed under this Division, shall advertise or cause or permit to be advertised, any representations in any form which in any manner, whether directly or indirectly refer to the cost, price, charge, or fee to be paid for any commodity or commodities furnished or any service or services performed by any person licensed as a . . . optometrist . . . registered dispensing optician, when those commodities or services are furnished in connection with the . . . business for which he is licensed. . . ."
>
> Section 2556: "It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof. . . ."
>
> Section 3129: "It is unlawful to advertise at a stipulated price . . . any of the following: . . . the furnishing of a lens, lenses, glasses, or the frames or fittings thereof. . . ."

Title 16 of the Professional and Vocational Regulations of the State of California provides in relevant part:

> Section 1515(b): "No advertising of any optometrical service may state any stipulated amount of money or no money as a 'down payment' or any 'no charge for credit' or any stipulated

amount of money as a periodical payment or at the termination of any period of time."

Provision is also made for possible criminal penalty for the violation of each of the sections.

It further appears from the verified complaint and the records herein that as a result of the proscriptions [sic] in the sections, there is in California no publication, advertising or promotion of the prices of prescription eyeglasses, and CCAG and the Named Plaintiffs are thereby deprived of true factual information concerning comparative pricing and where prescription eyeglasses might be purchased at such pricing.

CCAG and the Named Plaintiffs seek ultimate permanent relief by way of this court's declaration that the provisions of Sections 651.3, 2556 and 3129 of the Business and Professions Code of the State of California and Title 16, Section 1515(b), of the Professional and Vocational Regulations of the State of California, and each of them, to the extent that such provisions deprive them of news media public offerings of true factual information as to comparative costs and prices and where to purchase eyeglasses and kindred services at such costs and prices, are violative of their United States Constitution, First

Amendment, immunities and privileges, and, if necessary, permanent injunctive enforcement of the declaration.

Presently CCAG and the Named Plaintiffs seek temporary injunctive relief from the Defendants' enforcement of those provisions of the Sections asserted to the extent that such enforcement would deprive them of news media public offerings of true factual information concerning eyeglasses and kindred services as above delineated.

Motions:

We deny the Defendants' motion to dismiss the complaint and cause.

We reject the suggestion to abstain and defer to the State of California courts a state law interpretation of the sections involved. *See Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); and *Zwickler v. Koota*, 389 U.S. 241, 252-55 (1967).

The standing of CCAG as a proper party plaintiff is not established by undisputed evidence, and we reserve for a future determination, if required, the lawful standing of CCAG as a proper party plaintiff in these proceedings. *Cf. Construction*

Industry Association of Sonoma County v. Petaluma, No. 74-2100 (9th Cir. Aug. 13, 1975) at 6-9.

We grant the motion of the Named Plaintiffs for preliminary injunctive relief as sought.

Discussion:

The Defendants contend that news media paid informational advertisements of price structures for commodities and services at public offerings are "commercial" or "business" speech which enjoy no First Amendment protection under the rationale and rule of *Valentine v. Chrestensen*, 316 U.S. 52 (1942) [hereinafter cited as *Chrestensen*]. The rationale of *Chrestensen* has been criticized for nearly 20 years. Concurring in *Cammarano v. United States*, 358 U.S. 498 (1958), Mr. Justice Douglas wrote:

> "*Chrestensen* . . . held that business advertisements and commercial matters did not enjoy the protection of the First Amendment . . . was casual, almost offhand. And it has not survived reflection. . . . Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment. . . ." 358 U.S. at 513-14.

Informative is Mr. Justice Brennan's dissent in *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314, n. 6 (1974).

Lately, the *Chrestensen* rationale was sent to oblivion in *Bigelow v. Virginia*, 43 U.S.L.W. 4734 (U.S. June 16, 1975). 1/ Therein the majority at 4737 say of the *Chrestensen* rationale of non-First Amendment protection "to paid commercial advertisements" that:

> "Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relation*, 413 U.S. 376, 384 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).
>
> "The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement invovled sales or 'solicitations,' *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111 (1943) . . . or because appellant's motive or the motive of the advertiser may

---

1/ True enough, *Bigelow, supra* involved commercial advertising of an abortion referral service, while the issue before us is commercial advertising of eyeglasses. Both involve commercial advertising and we see no significant distinction between the two.

have involved financial gain, *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The existence of 'commercial activity, in itself, is not justification for narrowing the protection of expression secured by the First Amendment.' *Ginzburg v. United States*, 383 U.S. 463, 474 (1966).

. . . .

"The fact that [*Chrestensen*] had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*."

Finally, the majority completely sweeps away and eradicates the *Chrestensen* rationale via the statement at p. 4739:

"The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

"The Court has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.' *NAACP v. Button*, 371 U.S., at 429. Regardless of the particular label asserted by the State--whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'--a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."

See Anderson, Clayton & Co. v. Washington State Department of Agriculture, _____F. Supp. _____ (W.D. Wash. _____, 1975). *See also Population Services International v. Wilson*, 398 F. Supp. 321 (S.D. N.Y. 1975), *appeal docketed sub. nom. Carey v. Population Services International*, 44 U.S.L.W. 3162 (U.S. Sept. 30, 1975) (No. 75-443).

The Named Plaintiffs do not contend that they as a consenting audience are seeking to enforce a prospective advertiser's right to exercise his freedom of commercial speech but rather a correlative right to receive such informational advertisements. We are satisfied that the United States Supreme Court's case law recognition of an implied personal constitutional privilege and immunity to receive and have the fruit of free speech and press lawfully exercised under the First Amendment has now made the full circle.

Justice Brennan in his concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), wrote at 308:

"It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make

> the express guarantees fully meaningful. [Citing cases] I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

We conclude that the Named Plaintiffs' individual right to receive and have truthful information of comparative prices and where to buy corrective eyeglasses for the furtherance of his health and welfare is protected by the First Amendment as "'[i]t is now well established that the Constitution protects the right to receive information and ideas. "This freedom (of speech and press) . . . necessarily protects the right to receive. . . ." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) . . . .' *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)." *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1971);[2/] *Terry v. California State Board of Pharmancy*, 395 F. Supp. 94 (N.D. Cal. 1975); and *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974), *prob. juris. noted*, 43 U.S.L.W. 3499 (U.S. March 17, 1975) (No. 74-895).

2/ For an updated review of the development of the right to receive, *see* 63 Geo. L.J. 775, 777, *et seq.* (1975).

The Defendants rely upon the rationale of a valid and necessary police power protection of the health and welfare of a state's residents as expressed in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), and *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), to support the constitutionality of the challenged sections. That reliance is poorly placed. The statutory provisions under attack in those two cases were regulatory licensing measures placed on the artisans engaged in the prescribing, making, and dispensing of eyeglasses and forbidding any type of, *inter alia*, advertisement solicitation of business. Those challenges were based upon claims of a lack of due process and unequal treatment under the Fourteenth Amendment. Restrictions upon the freedom to speak and the correlative freedom to hear what is to be said under the First Amendment were not involved. *See Terry*, *supra* at 107-08.

Next, the Defendants recall to us that the challenged sections were enacted in 1973, 1939, and 1961; respectively, and have remained in effect ever since with obvious legislative approval. Therefore, they claim that the granting of preliminary relief to the Named Plaintiffs would run counter to and upset

the "status quo" rather than maintain the same as required by *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969), and *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963).

Non-legislative corrective action is admitted; nevertheless it does not necessarily follow that the *status quo ante litem* of the judicial recognition and protection of the Named Plaintiffs' fundamental rights under the Privilege and Immunities Clause of the First Amendment have remained in the *status quo* since the enactment date of the sections until the present day. Witness the slow erosion and ultimate death knell of the *Chrestensen* rationale of non-First Amendment protection of commercial speech dealt by *Bigelow, supra* and forecast in *Terry, supra.*

Thus we conclude that the status quo of the Named Plaintiffs' present day privileges and immunities under the First Amendment is threatened by the continued enforcement of the challenged provisions of the sections pending final determination of these proceedings upon the merits.

The Defendants further insist that each of the factors that must be considered in weighing the application for a

preliminary injunction as required by *King v. Saddleback Junior College District*, 425 F.2d 426, 427 (9th Cir. 1970), weigh heavily against a grant of temporary relief herein. We believe to the contrary. Based upon *Terry, supra,* per District Judge Peckham, and *Virginia Citizens Consumer Council, supra,* we conclude that:

1. The Named Plaintiffs' First Amendment privileges and immunities are of primary and fundamental importance and they suffer and sustain day by day irrevocable injury as a matter of law through state law infringement and deprivation of those privileges and immunities; yet the issuance of temporary relief from the enforcement of the offending provisions of the challenged sections will not result in any recognizable hardship to the legitimate interests and purposes of the State of California which can be adequately served by immediate legislative enactment of less drastic means of lawful police power health and welfare regulation of the artisans engaged in the making and dispensing of prescription eyeglasses. Such is the mandate of the United States Supreme Court in *Kusper v. Pontikes*, 414 U.S. 51, at 58-59 (1973):

> "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein*, 405 U.S., at 343. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button*, 371 U.S., at 438. If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton v. Tucker*, 364 U.S. 479, 488."

2. The public interest in the lawful dissemination of and the correlative interest in receiving true factual information concerning costs and prices and where to acquire corrective eyeglasses are equated, we believe, evenly with the highly measured public interest in the ultimate acquisition of pure foods,[3/] prescription drugs,[4/] abortions,[5/] and contraceptives;[6/] and

3. There is a great probability that at least the Named Plaintiffs will ultimately succeed in obtaining in these proceedings the ultimate declaratory judgment sought, and, if necessary,

---

3/ *Anderson, Clayton & Co., supra.*

4/ *Terry, supra,* and *Virginia Citizens Consumer Council, supra.*

5/ *Bigelow, supra.*

6/ *Population Services, supra.*

permanent injunctive enforcement thereof. *Terry, supra,* and *Virginia Citizens Consumer Council, supra.*

Finally, we conclude that the Named Plaintiffs are entitled to temporary injunctive relief enjoining the Defendants and all persons claiming by and through them from enforcing any of the provisions of the said sections inconsistent with the Named Plaintiffs' several First Amendment privileges and immunities as above delineated during the pendency of these proproceedings or until further order of the court.

We deem that security in the sum of $50 is sufficient security as required by Fed. R. Civ. P. 65(c).

The foregoing Decision constitutes this court's findings of fact and conclusions of law as provided by Fed. R. Civ. P. 52(a).

Counsel for the Named Plaintiffs is requested to prepare, serve opposing counsel, and present to this court within 15 days from the date hereof an appropriate order or orders based upon the findings of fact and conclusions of law above delineated for temporary injunctive relief consistent with the foregoing.

- - - - -

CASE NO. CV 74-2321 (AAH) FW

This cause was instituted by the plaintiff Terminal-Hudson Electronics, Inc. of California, dba Opti-Cal, (hereinafter referred to as Opti-Cal) some three months after the institution of Case No. 2079 above. The defendants in the two proceedings are substantially common to each. Opti-Cal seeks identical temporary and permanent relief from state law infringement of First Amendment privileges and immunities.

Thereafter the Defendants, via the Board of Medical Examiners, State of California, and the Board of Optometry, State of California, as plaintiffs in the cause numbered C 98058 then pending in the Superior Court of the State of California, County of Los Angeles, obtained a preliminary injunction enjoining Opti-Cal during the pendency of the cause "from performing anywhere in the State of California, directly or indirectly," any or all of the acts of advertising as proscribed by the challenged sections.

Following the hearing of all counsel herein on April 25 last upon Opti-Cal's companion Fed. R. Civ. P. 65 motion for temporary injunctive relief, and the Defendants' motion to dismiss, it appeared that the State Court's preliminary injunction

was still in force and effect and in a continuing status. Nevertheless we indicated that the motion to dismiss should be denied and the plaintiffs' motion for temporary injunction was submitted.

Subsequent decisions of the Supreme Court of the United States in *Hicks v. Miranda*, 43 U.S.L.W. 4857 (U.S. June 24, 1975), and *Doran v. Salem Inn, Inc.*, 43 U.S.L.W. 5039 (U.S. June 30, 1975), cause us to *sua sponte* reconsider the Defendants' motion to dismiss.

For the reasons expressed above in Case No. 2079, we are convinced that Opti-Cal should be entitled to temporary and ultimate permanent relief correlative to that accruing to the Named Plaintiffs from the flagrant anti-competition inducing state law infringement of Opti-Cal's First Amendment privileges and immunities.

However, we are mandated to conclude that the complaint and cause of Opti-Cal must be dismissed in deference to the pending State proceedings as the appropriate forum for the presentation of Opti-Cal's First Amendment claims. *Hicks, supra*, and *Doran, supra*. We realize that the state proceeding against Opti-Cal is civil and injunctive in nature, but it is based

on statutes providing possible criminal penalty. Consequently, those proceedings are "akin to a criminal proceeding." *See Huffman v. Pursue*, 43 U.S.L.W. 4379 (U.S. March 18, 1975); *cf. Hicks, supra* at 4862 n. 20, and at 4864 (Brennan, J., dissenting).

Counsel for the Defendants is requested to prepare, serve opposing counsel, and present to this court within 15 days from the date hereof an appropriate order or orders for the dismissal of Case No. 74-2321 in accordance with the above.

DATED this 5th day of January, 1976.

/s/s
CIRCUIT JUDGE

/s/s
SENIOR DISTRICT JUDGE

DISTRICT JUDGE

WHELAN, District Judge

(Concurring in part and dissenting in part.)

I concur in the decision of the majority that Action No. CV 74-2321 must be dismissed in deference to the pending State proceeding against Terminal Hudson Electronics, Inc. of California dba Opti-Cal.

However, I respectfully dissent from the holding of the majority in Action No. 74-2079. It would appear clear that under the rulings of the United States Supreme Court that the named Plaintiffs in the latter numbered action are not entitled to a preliminary injunction. The latest expression of the Supreme Court in *Bigelow v. Virginia*, 421 U.S. 809, speaking through Mr. Justice Blackmun, in fact states in footnote 10 on page 825 of the opinion:

> "Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156 (1973); Head v. New Mexico Board, 374 U.S. 424 (1963);

Williamson v. Lee Optical Co., 348 U.S. 483 (1955);
Barsky v. Board of Regents, 347 U.S. 422 (1954);
Semler v. Dental Examiners, 294 U.S. 608 (1935)."

What seems to be clear from a reading of *Bigelow and Pittsburg Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) is that purely commercial speech advertising purely commercial activity carried on within the state prohibiting such advertising is not protected by the First Amendment. In the instant case the advertising sought to be protected by the injunctive process is purely commercial in nature.

Thus it appears that there is no strong likelihood that such Plaintiffs are likely to prevail upon a full trial upon the merits. I would therefore deny the injunction sought.

DATED this 5 day of January, 1976.

Francis C. Whelan
FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

APPENDIX B

Anshen and Zorne
Attorneys at Law
139 South Beverly Drive
Beverly Hills, Calif. 90212
(213) 550-1529/275-9015

Attorneys for: Dick Davis, Ernest A. Jacobi
Pedro Gonzales, Nathan Seiderman

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA CITIZEN ACTION GROUP, et al., Plaintiffs, vs. DEPARTMENT OF CONSUMER AFFAIRS, et al., Defendants.	No. CV 74-2079-FW ORDER FOR PRELIMINARY INJUNCTION

Before: ELY, Circuit Judge; EAST, Senior District Judge;
WHELAN, District Judge

Charles W. Anshen, Esquire, Lee Zorne, Esquire, Attorneys for Plaintiffs; Evelle J. Younger, Esquire, Attorney General of California, Alvin J. Korobkin, Esquire, (Deputy Attorney General, Attorneys for Defendants; William A. Gould, Jr., Esquire, (Wilke, Fleury, Sapunor & Hoffelt), Olsen and Sorrentino, Donald Maffley, Esquire, (Athearn, Chandler & Hoffman), James Reed, Esquire, Attorneys for Amici Curiae.

ORDER FOR PRELIMINARY INJUNCTION

For the reasons stated in the written opinion of the Court filed January 6, 1976, it is adjudged, ordered and decreed as follows:

That the defendants in this action, and each of them, their officers, agents, servants, employees and attorneys, as well as their successors in office; be and they are preliminarily enjoined and restrained from enforcing those portions of Sections 651.3, 2556 and 3129 of the Business and Professions Code of the State of California which prohibit the advertising of the price of eyeglasses, pending final determination of these proceedings on the merits or until further order of this Court.

Defendants are further ordered to post security in the sum of $50.00.

Dated: February 3, 1976

/s/s
UNITED STATES CIRCUIT JUDGE

/s/s
SENIOR UNITED STATES DISTRICT JUDGE